STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY PELLEGRINO, Individually and as Personal Representative of the Estate of SHIRLEY ANN PELLEGRINO, Plaintiff-Appellee,	UNPUBLISHED May 27, 2008
v	No. 274743 Wayne Circuit Court
AMPCO SYSTEMS PARKING, Defendant-Appellant.	LC No. 03-325462-NI

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

In this admitted liability automobile negligence and wrongful death case, defendant AMPCO Systems Parking appeals as of right a judgment awarding plaintiff Anthony Pellegrino damages in the amount of $15,613,960.48.[1] Of the total damages awarded, $8,692,799.70 was awarded to the Estate of Shirley Ann Pellegrino, who was plaintiff's wife, and $6,921,160.78 was awarded to plaintiff individually. We affirm.

I. Facts and Procedural History

This case arises out of a single vehicle traffic accident that occurred on April 7, 2003. On that date, plaintiff and Shirley flew into Detroit Metropolitan Airport following a California vacation. As plaintiff and Shirley were riding in a shuttle van or bus owned by defendant and operated by a driver to retrieve their own automobile from a parking lot, the shuttle vehicle slipped on ice and struck a concrete barrier or retaining wall. Shirley died as a result of injuries she sustained in the accident, and plaintiff also sustained serious injuries.

Plaintiff filed suit against defendant. Count I was a negligence claim filed on plaintiff's own behalf, and Count II was a wrongful death action filed as a result of the death of plaintiff's wife. Defendant admitted liability at trial; thus, damages were the only issue at trial. The jury

[1] The jury awarded total damages of $14,900,000. The damages awarded in the judgment include additional amounts that the trial court awarded for costs and interest.

awarded plaintiff total damages in the amount of $14,900,000. A breakdown of those damages is as follows:

Estate of Shirley Pellegrino:

Pain & Suffering:	$ 750,000
Loss of Love, Society & Companionship:	$5,000,000
Future Non-Economic Damages:	$2,150,000
Future Economic Damages:	$ 500,000
TOTAL-Estate of Shirley Pellegrino:	$8,400,000

Anthony Pellegrino:

Past Non-Economic Damages:	$3,000,000
Future Non-Economic Damages:	$2,000,000
Future Economic Damages:	$1,500,000
TOTAL-Anthony Pellegrino:	$6,500,000

II. Analysis

A. Jury Instructions

Defendant argues that the trial court erred in refusing plaintiff's request that it instruct the jury pursuant to M Civ JI 15.01 because even though defendant admitted liability and the only issue at trial was damages, the trial court still should have defined proximate cause to the jury because there must be a proximate cause connection before there can be an award of damages.

Claims of instructional error are reviewed de novo on appeal. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). In a civil case, when requested by a party, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *id.* Even if somewhat imperfect, jury instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id.* Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *id.* Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. *Meyer v Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000).

The trial court did not err in refusing to give M Civ JI 15.01. M Civ JI 15.01 defines "proximate cause." The "Note on Use" states that "[t]his definition should accompany instructions which use the term 'proximate cause.'" In this case, the trial court's instructions did not use the term proximate cause because defendant admitted liability at trial. While it is possible for a defendant to admit negligence and argue that there is no liability because the negligence was not a proximate cause of the injury, *Shinholster v Annapolis Hosp*, 471 Mich 540, 587; 685 NW2d 275 (2004), in this case defendant never attempted to argue that it was not a proximate cause of plaintiff's injuries and, importantly, there was no evidence regarding the existence of another proximate cause. During opening argument, defendant explicitly admitted liability and informed the jury that the only issue was damages. Because defendant admitted liability, the only issue before the jury was damages, and because defendant did not dispute that it was a proximate cause of plaintiff's damages or assert that there was another proximate cause of plaintiff's damages, a determination of proximate causation was unnecessary. The trial court therefore did not err in refusing to instruct the jury on the definition of proximate cause under M Civ JI 15.01.

Defendant also argues that the trial court gave an altered version of M Civ JI 17.01, the admitted liability instruction, which defendant claims watered down the causation requirement by allowing plaintiffs to recover damages for injuries and damages that merely "related to" but were not "caused by" defendant's admitted negligence. M Civ JI 17.01 provides, in relevant part: "The defendant has admitted that [*he/she*] is liable to the plaintiff for any [*injury/damages*] which [*he/she*] caused. You are to decide only . . . the amount to be awarded to the plaintiff for such [*injury/damages*]." The Comment to the instruction provides: "The jury should not be permitted to consider the question of liability where it has been admitted. It is reversible error to submit any issue to the jury which has not been questioned or has been admitted."

The trial court instructed the jury that "[d]efendant . . . has admitted that it is liable to Anthony Pellegrino and the estate of Shirley Pellegrino for injuries and damages that *relate to* Shirley Pellegrino's death and Anthony Pellegrino's injuries. You are to decide only the amount of money to be awarded to both the estate of Shirley Pellegrino and Anthony Pellegrino individually for such injuries and damages." (Emphasis added.) According to defendant, the trial court's instruction watered down M Civ JI 17.01 because it allowed the jury to award damages based on a watered down version of causation. The trial was an admitted liability trial; thus, the only issue at trial was the amount of damages. Defendant acknowledged liability immediately during opening argument and informed the jury that the only issue for it to decide was the amount of damages. Because defendant's acknowledgment of liability included an admission of proximate causation, causation was not an issue at trial. Even though the trial court's M Civ JI 17.01 instruction used the words "relate to" instead of "caused," the instruction, on balance, adequately and fairly presented to the jury the theories of the parties and the applicable law.

B. *Batson* Challenge

Defendant next argues that the trial court erred in disallowing his peremptory challenge of juror Sylvia Greene, who was an African-American female. According to defendant, the trial court failed to follow the three-step procedure required in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), to determine whether he improperly exercised a peremptory challenge of juror Greene based on her race.

"[T]he applicable standard of review depends on which *Batson* step is at issue before the appellate court." *People v Knight*, 473 Mich 324, 338; 701 NW2d 715 (2005). In this case, all three *Batson* steps, are at issue before this Court. The first *Batson* step is a mixed question of law and fact. *Id.* at 342. This Court reviews the trial court's factual findings for clear error and reviews questions of law de novo. *Id.* at 345. If the second step of *Batson* is implicated, this Court's review of the proffered explanation is de novo. *Id.* If the third step of *Batson* is at issue, this Court's review of the trial court's ruling is for clear error. *Id.*

Defendant argues that the trial court improperly disallowed his peremptory challenge of juror Greene and failed to properly conduct the analysis required under *Batson* when a party opposes a challenge to a potential jury member on the grounds that the challenge is racially motivated. In *Batson*, 476 US at 89, 96-98, the United States Supreme Court held that a peremptory challenge to strike a juror may not be exercised on the basis of race. Under *Batson*, there is a three-step process to determine whether a challenger has improperly exercised peremptory challenges. First, the opponent of the challenge must make a prima facie showing of discrimination based on race. *Id.* at 93-97. Once the prima facie showing is made, the burden then shifts to the challenging party to come forward with a neutral explanation for the challenge. *Id.* at 97. Finally, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination. *Id.* at 98. *Batson* applies to civil proceedings. See *Edmonson v Leesville Concrete Co, Inc*, 500 US 614, 630; 111 S Ct 2077; 114 L Ed 2d 660 (1991).

Our Supreme Court has noted that strict adherence to the *Batson* procedure is not constitutionally mandated, *People v Bell*, 473 Mich 275, 297; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005), and that a trial court's failure to comply perfectly with *Batson* "is not error as long as trial courts do not shift the burden of persuasion onto the challenger." *Id.* at 298. However, our Supreme Court has also underscored the importance of the trial court's adherence to the three-step procedure outlined in *Batson*:

> When a trial court methodically adheres to *Batson*'s three-step test and clearly articulates its findings on the record, issues concerning what the trial court has ruled are significantly ameliorated. See, e.g., *United States v Castorena-Jaime*, 285 F3d 916, 929 (CA 10, 2002). Not only does faithful adherence to the *Batson* procedures greatly assist appellate court review, but the parties, the trial court, and the jurors are well-served by thoughtful consideration of each of *Batson*'s steps as well. Thus, we observe that *Batson*, as a constitutional decision, is not discretionary. Our trial courts must meticulously follow *Batson*'s three-step test, and we *strongly* urge our courts to *clearly* articulate their findings and conclusions on the record.
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> In the event a trial court fails to clearly state its findings and conclusion on the record, an appellate court must determine on the basis of a fair reading of the record what the trial court has found and ruled. See, e.g., *Mahaffey v Page*, 162 F3d 481, 482-483 (CA 7, 1998). This is not the preferred route. Because of the importance of the right at stake, as well as the societal and judicial interests implicated, we again direct our trial courts to carefully follow each of *Batson*'s three steps, and we further urge the courts to clearly articulate their findings and conclusions with respect to each step on the record. . . . [*Knight*, *supra* at 338-339 (emphasis in original).]

When defense counsel attempted to exercise a peremptory challenge of juror Greene, counsel for plaintiff explicitly challenged defense counsel's peremptory challenge under *Batson*, stating: "I object. I make a Batson challenge." The trial court excused the jurors and asked defense counsel to articulate his reason for seeking to peremptorily excuse juror Greene. Defense counsel articulated the following reason for exercising a peremptory challenge of Greene:

> The basis for this, we have Ms. Greene, all of her testimony—
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> I asked her followup [sic] questions. And I asked her about the first husband and the second husband, she described at the intensity of the loss, of her passion for loss wasn't as great as it was for the loss of her mom who was five years ago. This lady told me in response to the question that she grieves still today, her grief is at the same level that it was the day of her mom's death, okay. It is on that basis, I might say to the Court that I excluded juror number two, based on her mom recently passing away and the intensity of her feelings. It is the exact same reason as to juror number one [Greene].

After defense counsel explained his reason for seeking to excuse juror Greene, counsel for plaintiff accused defense counsel of using race as a basis for challenging potential jurors. The trial court summarily disallowed defendant's peremptory challenge of juror Greene without articulating the *Batson* three-step procedure or making findings and conclusions regarding the factors.

Appellate review of this issue is difficult because the trial court did not meticulously follow *Batson*'s three-step procedure and did not clearly state its findings and conclusions on the record. Because the trial court did not carefully follow and clearly articulate its findings with respect to the three *Batson* steps, this Court "must determine on the basis of a fair reading of the record what the trial court has found and ruled." *Id.* at 339.

The first step under *Batson* requires the party making the *Batson* challenge to establish a prima facie case of discrimination based on race to (1) show that members of a cognizable racial group are being peremptorily removed from the jury pool and (2) articulate facts to establish an inference that the right to remove jurors peremptorily is being used to exclude one or more potential jurors from the jury on the basis of race. *Batson*, *supra* 476 US at 96. "[A] 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Id.* at 97. In addition, "the prosecutor's questions and statements during *voir dire* examination and in exercising his [or her] challenges may support or refute an inference of discriminatory purpose." *Id.* But "the race of a challenged juror alone is not enough to make out a prima facie case of discrimination. The mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire . . . is not enough to establish a prima facie showing of discrimination." *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996).

Although the trial court did not explicitly articulate plaintiff's burden to establish a prima facie showing of discrimination, in making his *Batson* objection, counsel for plaintiff asserted

that with the exception of one non-black female juror (Amy Church), who defense counsel unsuccessfully challenged for cause and later peremptorily excused, "every one of [defense counsel's] challenges is directed at a black woman." However, counsel for plaintiff acknowledged that "[w]e've only had black women sitting in the jury box."[2] Review of the voir dire transcript reveals that counsel for defendant exercised his first peremptory challenge to excuse Amy Church, a non-black female who cried during voir dire and sympathized with the decedent's family because her own grandmother had recently died. Counsel for defendant exercised his second peremptory challenge to excuse Tara Chapas, an African-American female who suggested that she was sympathetic to plaintiff's family and had recently found out that her own father had died "some years ago[,]" although she had never met him.

The basis for defense counsel's peremptory challenge of juror Greene was consistent with his explanations for challenging the other two jurors, one black and one non-black, who he sought to exclude peremptorily: he was seeking to exclude from the jury potential jurors who had recently lost family members and who might be sympathetic to plaintiff based on their own personal experiences with the death of loved ones. Under *Batson*, a pattern of strikes against jurors of a specific race may give rise to an inference of discrimination. *Batson*, *supra* 476 US at 97. At the same time, "[t]he mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire . . . is not enough to establish a prima facie showing of discrimination." *Clarke*, *supra* at 383. Based on the facts in this case, there was not a pattern of discrimination that would give rise to an inference that prospective African-American female jurors were being excluded because of race. At the time defense counsel attempted to peremptorily excuse juror Greene, defense counsel had already exercised two peremptory challenges. One of defense counsel's peremptory challenges was to excuse Amy Church, a non-black female, and the other was to exclude Tara Chapas, an African-American female. Therefore, juror Greene was only the second African-American that defense counsel sought to exclude. "In order for a pattern of strikes to develop, several jurors might be struck without objection until a pattern begins to emerge." *Knight*, *supra* at 346. Although the trial court did not make findings or conclusions regarding the first *Batson* step, we conclude that counsel for defendant's peremptory challenge of two African-Americans does not equate to "several jurors" being struck and does not, without more, establish a pattern of discrimination.[3]

The trial court explicitly addressed the second step of the *Batson* inquiry by instructing defense counsel to articulate his basis for peremptorily challenging juror Greene. The second *Batson* step "does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the [challenger's] explanation. Unless a discriminatory intent is inherent in the [challenger's] explanation, the reason offered

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[2] In fact, although it is impossible to ascertain the race of all of the potential jurors, the record does reveal that there were some men in the venire. However, the final jury was an all-woman jury, and three of the jurors were African-American.

[3] After the trial court disallowed defense counsel's attempted peremptory challenge of juror Greene, the trial court granted defense counsel another peremptory challenge, which defense counsel used to excuse Kathleen Cavanaugh, whose race is not identified in the record.

will be deemed race neutral.'" *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995), quoting *Hernandez v New York*, 500 US 352, 360; 111 S Ct 1859; 114 L Ed 2d 395 (1991). When the trial court asked defense counsel to articulate the basis for his peremptory challenge of juror Greene, defense counsel explained that he sought to exclude Greene because of the passion and intensity of her grief from the death of her own mother and her lesser grief from the death of her two husbands. Defense counsel specifically noted that Greene stated that her grief over her mother's death was at the same level as it was when her mother died five years before. This is a facially valid race neutral explanation for defense counsel's desire to excuse juror Greene. There is no discriminatory intent inherent in defense counsel's explanation for why he peremptorily challenged Greene. Furthermore, defense counsel's rationale for seeking to exclude Greene from the jury is consistent with defense counsel's rationale for seeking to exclude the two other potential jurors who he sought to exclude peremptorily: he was seeking to remove jurors who had recently lost family members and who might be sympathetic to plaintiff based on their own personal experiences with the death of loved ones. Although the trial court did not make an explicit finding regarding whether defense counsel's basis for peremptorily challenging juror Greene was race neutral, we find that there is no discriminatory intent inherent in defense counsel's explanation, and the explanation was facially valid.

Under the third step of the *Batson* inquiry, the trial court must decide whether the opponent of the challenge has proven purposeful discrimination. *Batson*, *supra* 476 US at 98. Whether purposeful discrimination has been established depends on whether the trial court finds the race-neutral explanations to be credible. *Bell*, *supra* at 283. Credibility can be measured by the challenger's demeanor, by how reasonable or improbable the challenger's explanations are, by whether the proffered rationale has a basis in accepted trial strategy, and by other factors. *Id.* In this case, the trial court wholly failed to make any findings regarding whether counsel for plaintiff proved purposeful discrimination. A fair reading of the record reveals that although the trial court disallowed counsel for defendant's peremptory challenge of juror Greene, the trial court did not specifically conclude that counsel for plaintiff had proved purposeful discrimination.[4] Moreover, the trial court actually gave counsel for defendant an additional peremptory challenge, which defense counsel exercised to excuse juror Kathleen Cavanaugh. Based on our examination of the record, we do not believe that the trial court would have granted counsel for defendant an additional peremptory challenge if it had concluded that counsel for defendant was improperly exercising those challenges to exclude jurors based on race.

In sum, although the trial court's deficient *Batson* analysis has rendered our review of this issue difficult, we ultimately conclude, based on a fair reading of the record, that the trial court rejected plaintiff's *Batson* challenge. The trial court's failure to strictly comply with

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[4] Given the lack of findings and conclusions regarding any of the *Batson* steps, we "must determine on the basis of a fair reading of the record what the trial court has found and ruled." *People v Knight*, 473 Mich 324, 339; 701 NW2d 715 (2005). The record in this case includes a post-judgment motion hearing in which the trial court made statements that might also support the conclusion that the trial court found that defense counsel did not engage in purposeful discrimination. On the record at the September 25, 2006, motion hearing, the trial court stated, "I'm not going to make findings that a lawyer like [defense counsel] is a racist."

Batson "is not error as long as trial courts do not shift the burden of persuasion onto the challenger." *Bell*, *supra* at 298. Any deficiencies in the trial court's *Batson* analysis, and there were many, did not improperly shift the burden of persuasion.

"A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender." *Id.* at 293. In this case, despite the trial court's deficient *Batson* analysis, no *Batson* error occurred because the trial court disallowed plaintiff's peremptory challenge of juror Greene and she was therefore not dismissed from the jury. Despite the trial court's apparent rejection of plaintiff's *Batson* challenge, however, the trial court did disallow defense counsel's peremptory challenge of juror Greene. The question is therefore what is the appropriate remedy for the trial court's denial of defendant's peremptory challenge?

Historically, the remedy for an improper denial of a peremptory challenge has been automatic reversal. See *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981); *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998); *Clarke*, *supra*. However, in *Bell*, a majority of the Supreme Court concluded that Michigan's "harmless error jurisprudence has evolved a great deal" and that *Miller* and *Schmitz* "are no longer binding, in light of our current harmless error jurisprudence, to the extent that they hold that a violation of the right to a peremptory challenge requires automatic reversal." *Bell*, *supra* at 293-294. In *Bell*, the Supreme Court stated:

> We arrive at this conclusion by recognizing the distinction between a *Batson* error and a denial of a peremptory challenge. A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal. In contrast, a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension.
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> Because the right to a peremptory challenge in Michigan is not provided by the Michigan Constitution but, rather, by statute and court rule, we conclude, as did the United States Supreme Court, that the right is of non-constitutional dimension. Thus, under our jurisprudence, a violation of the right is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited. [*Id.* at 293-295 (footnotes omitted).]

Because *Miller* and *Schmitz* are no longer precedentially binding, we decline to follow them under the limited facts of this case. In this case, there was no *Batson* violation, and, while the trial court disallowed defense counsel's peremptory challenge of juror Greene, the trial court gave defense counsel another peremptory challenge, which defense counsel exercised. Thus, we find that any error is subject to a harmless error analysis. *Id.*

To preserve for appeal a question regarding jury selection, a party generally must exhaust his or her peremptory challenges. *People v Jendrzejewski*, 455 Mich 495, 514-515 n 19; 566 NW2d 530 (1997). Although counsel for defendant did exhaust his three peremptory challenges

in this case, it was not necessary for him to do so to preserve this issue because a party alleging a wrongful denial of the right to exercise a peremptory challenge need not exhaust all peremptory challenges in order to preserve the issue, because the challenged juror will remain on the jury regardless of whether the litigant utilizes all remaining peremptory challenges. *Schmitz*, *supra* at 527-528. In any event, because this issue is preserved, we review the trial court's denial of defendant's right to peremptorily challenge juror Greene for a miscarriage of justice. *Bell*, *supra* at 294. A miscarriage of justice exists if it affirmatively appears that the error undermines the reliability of the verdict. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this case, the only issue at trial was damages, and the verdict was unanimous. It is therefore highly likely that if defense counsel had been permitted to peremptorily excuse juror Greene, the replacement juror would have joined in the unanimous verdict. Thus, no miscarriage of justice resulted from the trial court's improper denial of defense counsel's right to peremptorily excuse juror Greene, and the error was harmless.

Defendant also argues that the trial court improperly attempted to balance the racial composition of the jury by protecting African-Americans from being peremptorily challenged in violation of MCR 2.511(F)(2). MCR 2.511(F) provides:

> (1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.
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> (2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.

According to defendant, the policy of MCR 2.511(F)(2) prohibits judges from exercising their own agenda to achieve racially balanced juries.

The trial court stated on the record "that I was interested and it would be a goal of mine to have a jury that represented the racial composition of this county." To the extent that the trial court desired a racially balanced jury, such a desire does not run afoul of MCR 2.511(F)(2). MCR 2.115(F)(2) prohibits "[d]iscrimination during voir dire on the basis of race[,]" and we cannot conceive how the trial court's desire to have a racially balanced jury could possibly be characterized as "discrimination" under MCR 2.115(F)(2). If anything, the trial court's statements permit the inference that the trial court may have acted to protect minority jurors from being excused peremptorily and thus to prevent discrimination based on race. Defendant's argument that MCR 2.115(F)(2) was violated is without merit.

C. Counsel for Plaintiff's Closing Argument

Defendant argues that a portion of counsel for plaintiff's closing argument, in which counsel for plaintiff recited a poem about organ donation, was so inflammatory that the entire damages award must be reversed. Immediately following closing argument, defendant moved for a mistrial based on counsel for plaintiff's reading of the poem, and the trial court denied the motion. This Court reviews for an abuse of discretion a trial court's decision on a motion for mistrial. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003)

The portion of counsel for plaintiff's closing argument to which defendant objects is as follows:

> If I wanted to sum up what I think the children were communicating and what I think that this life of Shirley Pellegrino and the losses that I must communicate to you for seventeen people, I think it would be best if I read this, which I think symbolizes more than anything else the person whom I represent in the losses about which I speak.
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> "The day will come when my body will lie upon a white sheet neatly tucked under four corners of a mattress located in a hospital busily occupied with the living and dying. And at a certain moment a doctor will determine that my brain has ceased to function. And for all practical purposes my life has stopped. When that happens, do not attempt to instill artificial life into my body by the use of a machine. And don't call this my deathbed, call it the bed of life and let whatever is usable be taken from me to help others lead lives fuller. Give my sight to a man who has never seen a sunrise, a baby's face or the love in the eyes of a woman. Give my heart to a person whose own heart has caused nothing but endless days of pain. Give my blood to a teenager who is pulled from the wreckage of a car so that he might live to see his grandchildren play. Give my kidneys to one who depends upon a machine to exist. Take my bones, every nerve and muscle in my body and find a way to make a crippled child walk. Explore every corner of my brain, take my cells if necessary and let them grow so that someday a speechless boy will shout at the crack of a bat or a deaf girl will hear the sound of rain against her window. Burn what it left. Scatter my ashes to the wind to help the flowers grow. And if you must bury something, let it be my faults, my weaknesses and all prejudices against my fellow man. Give my sins to the devil. Give my soul to God. And if by chance you wish to remember me, do it with a kind deed or a word to somebody who needs you. And if you do all that I have asked, I will live forever.["]

This Court has previously issued an opinion in a case in which counsel for plaintiff read the same poem at issue in this case. *Porter v Northeast Guidance Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, decided October 5, 2001 (Docket Nos. 213190, 217974, 223647, 223648) (Murphy, J., concurring in part and dissenting in part) (*Porter I*). In *Porter I*, the defendants argued that the trial court erred in admitting testimony that the decedent's organs were donated. This Court held that testimony that the decedent's organs were donated was not relevant to any issue of damages. In rejecting the plaintiff's argument that admission of this evidence was harmless, this Court quoted a portion of counsel for plaintiff's closing argument, in which counsel for plaintiff recited the same poem that he recited during closing argument in the instant case. This Court rejected the argument that the organ donation discussion "was not for the purpose of inflaming the passions of the jury[,]" stating: "The issue of organ donation was an emotional one. It was not relevant to any measure of damages. It was utilized to invoke the sympathies of the jury. Therefore, the error in its admission was not harmless." This Court ruled that the defendants were therefore entitled to a new trial, but stated that "because the organ donation issue is related to the issue of damages, not liability, we limit the new trial to the issue of damages only." In lieu of granting leave to appeal, our Supreme Court, noting that "a new

trial limited to the issue of damages is disfavored unless the defendant's liability is clear," remanded to the trial court for a new trial on all issues. *Porter II*.

In this case, the only issue at trial was damages. As this Court stated in *Porter I*: "The issue of organ donation was . . . not relevant to any measure of damages." The subject of the poem, organ donation, has even less relevance to the facts of this case because, while the decedent's organs were donated in *Porter I*, Shirley Pellegrino's organs were not donated. Nevertheless, in *Porter I*, the defendant did not specifically challenge counsel for plaintiff's reading of the organ donation poem during closing argument, and this Court did not explicitly rule that the reading of the poem was improper. The defendants in *Porter I* argued "that the trial court erred in admitting testimony . . . that the decedent's organs were donated . . . ." In responding to the plaintiff's argument that any error in the admission of the evidence was harmless, this Court quoted the language of the poem as negating any contention that the organ donation discussion was not to inflame the passions of the jury. Ultimately, this Court concluded in *Porter I* that any error in the admission of organ donation testimony was not harmless. But, significantly, this Court never ruled that the reading of the poem itself was improper. Rather, this Court cited the poem to underscore its conclusion that the plaintiff's introduction of testimony regarding organ donation was to inflame the passions of the jury. And, as previously noted, the defendants in *Porter* did not raise the issue of the propriety of counsel for plaintiff reading the poem. Therefore, our holding in *Porter I* does not support defendant's contention that counsel for plaintiff's reading of the poem during closing argument was improper.

D. Testimony of Dr. Gerald Shiener and Bradley Sewick, Ph.D.

Defendant next argues that the trial court erred in permitting Bradley Sewick, Ph.D., and Dr. Gerald Shiener to testify regarding their interpretation of MRI and CT scans of plaintiff's brain. According to defendant, Dr. Shiener and Ph.D. Sewick's testimony was improper under MCL 500.3135(2)(a)(ii). Defendant also argues that with respect to both Dr. Shiener and Ph.D. Sewick, the trial court failed to properly execute its role as gatekeeper under MRE 702 and MCL 600.2955(1) to exclude testimony that is inadmissible under MCL 500.3135(2)(a)(ii).

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). The abuse of discretion standard recognizes "'that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

According to defendant, under MCL 500.3135(2)(a)(ii), a question of fact for the jury regarding the existence of a closed head injury or traumatic brain injury is only created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries testifies under oath that there may be a serious neurological injury and that because Dr. Shiener and Ph.D. Sewick were unable to testify that they focus their practices as allopathic or osteopathic physicians who regularly diagnose or treat closed head injuries, MCL 500.3135(2)(a)(ii) is not satisfied. MCL 500.3135(2) provides, in relevant part:

> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
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> * * *
>
> (ii) [F]or a closed head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

In *Kreiner v Fischer*, 471 Mich 109, 132 n 15; 683 NW2d 611 (2004), the Supreme Court stated that MCL 500.3135(2)(a)(ii) "creates a special rule for closed head injuries. . . ." MCL 500.3135(2)(a)(ii) provides an exception under which a plaintiff may automatically establish a question of fact regarding whether he or she suffered a serious impairment of body function if the plaintiff provides the testimony of a licensed allopathic or osteopathic physician that the plaintiff may have suffered a serious neurological injury. *Churchman v Rickerson*, 240 Mich App 223, 226, 232; 611 NW2d 333 (2000). To give effect to the phrase "serious neurological injury," (at least in the summary disposition context), the closed-head injury provision of MCL 500.3135(2)(a)(ii) requires more than a diagnosis that a plaintiff has sustained a closed-head injury. *Churchman*, *supra* at 229. The plain language of the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was serious or severe. *Id.* at 230. However, this Court has recognized that it is sufficient if the doctor's "impl[ies] that a neurological injury may be serious." *Id.*

Ph.D. Sewick testified regarding his interpretation of an MRI that was taken of plaintiff's brain. According to Sewick, plaintiff had positive findings of brain damage on neuro-imaging. Sewick asserted that he reviewed the films, which had "indications of prominence of the cortical sulci which is very consistent with what [Dr. Michele Keys[5]] has described here as mild cortical atrophy." He further asserted that the prominence of the sulci show a loss of tissue on the brain and when there is a loss of tissue, the brain does not function as well. Ph.D. Sewick acknowledged in his testimony that "Dr. Keyes [sic] has a tremendously greater amount of expertise in this area and I'm using my knowledge of neuro-psychology based upon her findings to understand what's going on with this patient."

Dr. Shiener testified that on the day of the accident, a CT scan of plaintiff's brain was performed in the emergency room at the hospital, which revealed a "basically normal brain." According to Dr. Shiener, the CT scan "showed no effacement or brain swelling and it showed no . . . atrophy or big spaces between the grooves in the brain." However, Dr. Shiener asserted that a subsequent MRI "showed bigger spaces between the grooves in the brain and a sign of loss of brain tissue that wasn't present on the prior study and that indicates the effects of brain

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[5] Dr. Michele Keys was defendant's expert witness. She reviewed the MRI of plaintiff's brain and concluded that while the MRI showed mild cortical atrophy, this did not constitute objective evidence of brain injury.

damage." Dr. Shiener further testified that if plaintiff had been suffering from atrophy or the atrophy was related to his age, it would have shown up on the first CT scan and would have been noted.

Regarding Ph.D. Sewick, we observe that defense counsel himself questioned Ph.D. Sewick about his interpretation of the CT scan and MRI of plaintiff's brain, as well as the MRI report. Generally, "error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). However, this Court has previously ruled that Ph.D. Sewick is not qualified under MCL 500.3135(2)(a)(ii) because he is not an allopathic or osteopathic physician. *Reed v Yackell (On Remand)*, unpublished opinion per curiam of the Court of Appeals, decided June 8, 2004 (Docket No. 236588), rev'd on other grounds 473 Mich 520 (2005). Therefore, even though defendant arguably waived the issue, in light of *Reed* we find that Ph.D. Sewick was not qualified under the statute. [6]

However, Dr. Shiener was qualified to testify under MCL 500.3135(2)(a)(ii). Dr. Shiener is a medical doctor who is board certified by the American Board of Psychiatry and Neurology. He therefore qualifies as an allopathic physician. Although defendant contends that Dr. Shiener was unable to testify that he regularly diagnoses or treats closed-head injuries, Dr. Shiener testified that he has seen "thousands" of patients with head trauma since he began his private practice in the 1970s. When asked if he reviews radiographic reports or films of his patients, Dr. Shiener replied:

> Part of our training, and I trained in the era where CT or computerized tomography was a relatively new technology so we were all very excited about that. And the neuroradiologist at Sinai would have regular classes for us. And psychiatrists would regularly review scans of patients that they're treating when the psychiatrist causes those scans to be performed. Likewise with MRI, magnetic resonance imaging, that's newer technology but that's an ongoing part of what psychiatrists do and learn and that's part of our board examination. We would have conferences reviewing those studies with speech pathologists, neuro-psychologists, neuro-radiologists and psychiatrists as well as neurologists to look at how those scans are expressed in live patients or when live patients have problems, what their scan findings are.

Dr. Shiener did not explicitly testify that plaintiff suffered a severe or serious neurological injury. But such explicit testimony is not required. Under *Churchman*, the plain language of the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was serious or severe; however, it is sufficient if the doctor's testimony "impl[ies] that a neurological injury may be serious." *Churchman*, *supra* at 230. In this case,

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[6] We note that in *Reed*, we did not reverse the jury verdict in favor of the plaintiff based on Ph.D. Sewick's lack of qualifications under MCL 500.3135(2)(a)(ii) because the plaintiff presented the testimony of another doctor who was qualified to testify under the statute. Similarly, in this case, another doctor, Dr. Shiener, was qualified to testify under the statute.

Dr. Shiener's testimony implies that plaintiff suffered a serious neurological injury. Dr. Shiener testified that plaintiff had "deficits and . . . atrophy . . . in the frontal temporal area or the front part of the brain . . . ." He also asserted that even mild brain atrophy is problematic because "brain tissue does not heal. And brain tissue does not reproduce. And so when the brain is damaged, those cells are lost." Dr. Shiener also described changes in plaintiff's personality and abilities because of his brain injury. According to Dr. Shiener, plaintiff underwent "significant personality changes" as a result of his brain injury. He became irritable and argumentative. He was unable to care for himself and tried to live with his children, but that was problematic because he would become frustrated and move in with a different child or back into his own home. Furthermore, plaintiff was unable to work in his profession of running a dental laboratory as a result of his brain injury.

In sum, while Dr. Shiener did not explicitly testify that plaintiff suffered a severe or serious neurological injury, Dr. Shiener's testimony implied that the neurological injury to plaintiff may be serious. *Id.* at 230. In addition, in light of Dr. Shiener's training, classes and conferences regarding CT and MRI scans and his experience treating "thousands" of patients with head trauma, Dr. Shiener was qualified to testify regarding the existence of a closed head injury in plaintiff under MCL 500.3135(2)(a)(ii). Therefore, the trial court did not abuse its discretion in admitting Dr. Shiener's testimony.

Defendant next argues that the trial court did not properly discharge its duty to act as a gatekeeper of expert testimony. According to defendant, Dr. Shiener and Ph.D. Sewick were not qualified to interpret CTs and MRIs, and the trial court failed to properly act as a gatekeeper under MRE 702 and MCL 600.2955(1) to exclude evidence that should not have been admitted under MCL 500.3135(2)(a)(ii) and because Dr. Shiener and Ph.D. Sewick were otherwise unqualified to interpret CTs and MRIs.

Regarding Dr. Shiener, defendant, noting that Dr. Shiener did not treat plaintiff, objected to Dr. Shiener interpreting the records of others (plaintiff's treating doctors) under MRE 702 and MRE 703. The trial court overruled the objection, stating: "Well I'll allow the testimony. Obviously it's subject to strike and the jury will be instructed to disregard it if that ruling is eventually made." Defense counsel responded: "Okay, and we'll raise it then, I guess, as we reach each fact." However, plaintiff correctly notes that defendant never objected to Dr. Shiener's testimony interpreting the CT or MRI scans. To the extent that defendant preserved his MRE 702 argument by objecting at trial, we note that Dr. Shiener's trial testimony was not precluded by MCL 500.3135(2)(a)(ii) because, for the reasons explained above, he was qualified under the statute. Similarly, any error on the part of the trial court in failing to inquire under MCL 600.2955(1) if Dr. Shiener was qualified to testify under MCL 500.3135(2)(a)(ii) was harmless because Dr. Shiener was qualified to testify regarding the existence of a closed head injury in plaintiff under MCL 500.3135(2)(a)(ii).

Regarding Ph.D. Sewick, defendant objected to Ph.D. Sewick interpreting the MRI of plaintiff's brain. According to defendant, Sewick was not board certified in neuro-radiology and was not qualified to interpret the MRI based on his education or qualifications. The trial court overruled defendant's objection, stating "I'll allow the testimony and find that Dr. Sewick is an expert and able to give opinion evidence on the condition of the Plaintiff's brain."

MRE 702 "requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." Staff Comment to 2004 Amendment of MRE 702. "MRE 702 requires the trial court to ensure that *each aspect* of an expert witness's proffered testimony . . . is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004) (emphasis added). The trial court's exercise of its gatekeeper role is within its discretion; however, "a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id.* at 780.

Because this Court has previously held that Ph.D. Sewick is not qualified to testify under MCL 500.3135(2)(a)(ii), *Reed*, *supra*, and the trial court permitted him to testify regarding his interpretation of the MRI of plaintiff's brain, the trial court failed to adequately perform its function as a gatekeeper under MRE 702 to ensure that each aspect of Ph.D. Sewick's testimony was reliable. The trial court should not have permitted Ph.D. Sewick to testify regarding his interpretation of the MRI of plaintiff's brain because this aspect of Ph.D. Sewick's testimony was outside the scope of his expertise and therefore unreliable. However, we find that the trial court's error in admitting this evidence was harmless.[7] MCL 769.26; MCR 2.613(A). A preserved, nonconstitutional error is harmless unless, "after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *Lukity*, *supra* at 495. "[R]eversal is only required if such an error is prejudicial . . . the appropriate inquiry 'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *Id.*, quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). In this case, contrary to defendants' argument on appeal, there was substantial untainted evidence that plaintiff suffered a closed head injury. First, Dr. Shiener testified regarding plaintiff's closed head injury. In addition, several other witnesses testified regarding the existence of plaintiff's closed head/traumatic brain injury. Specifically, the testimony of Drs. Robert A. Krasnick, Nelly Manganas, and Dr. W. John Baker established the existence of a closed head injury. Dr. Krasnick, a physician who treated plaintiff and other patients with traumatic brain injuries, testified that he diagnosed "traumatic brain injury with residual memory problems, psychological disturbance and possibly a component of posttraumatic headaches." Dr. Nelly Manganas, a psychiatrist who treated plaintiff for depression and prescribed him medication, similarly testified that plaintiff "underwent neuropsychological testing, which typically is the tool we use in order to confirm if there is any problems with the memory. And [plaintiff] did show evidence for closed-head injury on these issues." Finally, Dr. W. John Baker, who has a Ph.D. in psychology, is a Diplomat with the American Board of Professional Neuropsychology, and who conducted a neuropsychological evaluation of plaintiff, also testified that plaintiff "had some mild cognitive impairments, primarily in the area of memory . . . probably due to his traumatic brain injury." The testimony of Drs. Krasnick, Manganas, and Baker all provide evidence of the existence of, at the very least, mild traumatic brain injury in plaintiff.

The only evidence that tended to show that plaintiff did not suffer a closed head injury was the testimony of defendant's expert, Dr. Michele Keys. Dr. Keys, a D.O. who is board certified in Diagnostic Radiology and has a Certificate of Added Qualifications in

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[7] For purposes of this analysis, we presume, without deciding, that this issue is preserved.

Neuroradiology, read and interpreted the MRI of plaintiff's brain. According to Dr. Keys, the MRI revealed a "mild degree of . . . cortical . . . brain atrophy." Dr. Keys stated that mild cortical atrophy is not objective evidence of brain injury "[b]ecause so many people above the age of 55 or 60 have cortical atrophy of the brain." Dr. Keys acknowledged that there can be multiple causes for cortical atrophy and agreed that she would not quarrel with any of the clinicians who testified that plaintiff's brain was not operating correctly. She stated that her opinion was based solely on the "films."

Although the testimony of Dr. Keys somewhat contradicts the testimony of plaintiff's experts regarding the existence of a closed head injury in plaintiff, it is the role of the jury, not this Court, to weigh the evidence and resolve the conflicting testimony. See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Moreover, the test for determining whether the erroneous admission of Ph.D. Sewick's testimony regarding the MRI and CT scans of plaintiff's brain is harmless focuses on the nature of the error and its effect in light of the weight and strength of the untainted evidence. *Lukity*, *supra* at 495. The error was an evidentiary error. In light of the abundance of untainted testimony, primarily from doctors who had treated plaintiff, as well as the testimony of Dr. Shiener, which supports the existence of plaintiff's closed head injury, we conclude that the improper testimony of one witness, Ph.D. Sewick, was harmless.[8]

E. JNOV, New Trial, and Remittitur

Defendant argues that the trial court erred in denying its motion for JNOV, new trial or remittitur. This Court reviews de novo a trial court's decision on a motion for JNOV. *Livonia Bldg Materials Co v Harrison Constr Co*, 276 Mich App 514, 517; 742 NW2d 140 (2007). This Court must view the evidence and all legitimate inferences in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Id.* at 517-518. Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Id.* at 518. This Court reviews for an abuse of discretion a trial court's denial of motions for a new trial and for remittitur. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 595; 708 NW2d 749 (2005); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000).

Defendant first challenges the award of $3 million to plaintiff for past non-economic damages and $2 million for future non-economic damages. These amounts include compensation for plaintiff's traumatic brain injury, but the verdict form did not apportion a specific dollar amount for the brain injury. Citing MCR 2.611(E)(1), defendant argues that the trial court should have granted its motion for remittitur because there was not competent evidence to support the portion of this award that was based on the existence of a closed head or

[8] The dissent, in concluding that the erroneous admission of expert testimony was not harmless, cites the Supreme Court's reversal of this Court's opinion in *Minter v Grand Rapids*, 275 Mich App 220; 739 NW2d 108 (2007), rev'd ___ Mich ___ (Docket No. 133988, April 25, 2008). However, the basis for the Supreme Court's reversal of our *Minter* opinion was not the erroneous admission of expert testimony, but the lack of evidence establishing an issue of fact regarding whether the plaintiff suffered a serious impairment of body function or a permanent serious disfigurement.

traumatic brain injury because and Dr. Shiener and Ph.D. Sewick's testimony interpreting plaintiff's MRI and CT scans as revealing the existence of a closed head injury was improperly admitted.

A trial court's order of remittitur is governed by MCR 2.611(E)(1), which provides:

> If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgments in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

"According to the express language of the court rule, remittitur is justified if the jury verdict is 'excessive,' i.e., if the amount awarded is greater than 'the highest amount the evidence will support.'" *Palenkas v Beaumont Hosp*, 432 Mich 527, 531-532; 443 NW2d 354 (1989).

Defendant argues that without the testimony of Dr. Shiener and Ph.D. Sewick, there was no competent evidence to establish the existence of plaintiff's closed head injury. This is simply not the case. Defendant's argument presumes that the testimony of plaintiff's experts at trial all had to satisfy MCL 500.3135(2)(a)(ii), but, as stated above, MCL 500.3135(2)(a)(ii) provides an exception under which a plaintiff may automatically establish a question of fact regarding whether he or she suffered a serious impairment of body function. *Churchman*, *supra* at 232. The statute does not provide the exclusive manner for a plaintiff who has suffered a closed head injury to establish a factual dispute precluding summary disposition, *id*., and does not limit or preclude a party from establishing the existence of a closed-head injury at trial by evidence and testimony that does not satisfy MCL 500.3135(2)(a)(ii). Therefore, regardless whether plaintiff's experts met the requirements under MCL 500.3135(2)(a)(ii), plaintiff could still prove that he suffered from a closed-head injury at trial through other evidence. As stated above, the testimony of Drs. Krasnick, Manganas and Baker, who all treated plaintiff, all provided evidence that plaintiff had suffered a closed head or traumatic brain injury.

Defendant asserts that Dr. Michele Keys, whom he characterizes as "the only competent doctor[,]" found no objective evidence of brain damage. To the extent that Dr. Keys's testimony and the fact that plaintiff's memory improved when he took Aricept conflicts with the testimony of Drs. Krasnick, Manganas and Baker, defendant is essentially seeking asking this Court to weigh the evidence and resolve the conflicting testimony. This is the role of the jury, not the role of a reviewing court. It was up to the jury to decide whether plaintiff's experts or defendant's experts were more credible. This Court is reluctant to interfere with the jury's role of evaluating witness credibility, particularly if the evidence is conflicting. See *Nowack*, *supra* at 400.

Defendant argues that this Court should return the case to the trial court for a new trial because the verdict for past and future non-economic damages combines damages for numerous injuries and it is impossible to determine the amount that was based on the improper closed head injury testimony of Dr. Shiener and Ph.D. Sewick. Defendant further argues that the award for the closed-head injury tainted the award for other elements of the past and future non-economic damages. These arguments are unpersuasive because, as stated above, Dr. Shiener was qualified to testify under MCL 500.3135(2)(a)(ii), and even without Dr. Shiener and Ph.D. Sewick's testimony, there was competent evidence to support an award of damages for plaintiff's closed

head injury. Because defendant does not challenge the competence of the evidence related to other injuries included in past and future non-economic damages, the damage award for plaintiff's past and future non-economic damages should not be disturbed.

In the alternative, defendant argues that this Court should reduce the verdict to the highest amount the evidence will support. A trial court's order of remitted is governed by MCR 2.611(E)(1). "[R]emittitur is justified if the jury verdict is 'excessive,' i.e., if the amount awarded is greater than 'the highest amount the evidence will support.'" *Palenkas, supra* at 531-532. Contrary to defendant's argument, there was competent evidence establishing that plaintiff suffered a closed head injury. While plaintiff's head injury was not severe, Drs. Krasnick, Manganas and Baker all treated plaintiff and all agreed that plaintiff suffered a closed head injury. The jury decided to award plaintiff a large amount of damages for past non-economic damages, $3 million, and future non-economic damages, $2 million, which included damages for plaintiff's traumatic brain injury. The jury heard the testimony regarding plaintiff's mild closed head injury and was aware that plaintiff was still able to play golf, hunt, operate a motor vehicle, and drive a motor home towing a truck from Michigan to California. However, the jury also heard testimony regarding plaintiff's personality changes, memory problems, and inability to continue to perform his job after the accident. Moreover, the damages for past and future non-economic damages included amounts for pain and suffering, depression, post-traumatic stress disorder, impairment in the functioning of plaintiff's neck and back, and injury to his knee. There was evidence to support an award damages for all of these injuries, as well as plaintiff's closed head injury.

The trial court denied defendant's remittitur motion and this Court must defer to the trial court's ruling in this regard:

> An appellate court reviewing a trial court's grant or denial of remittitur must afford due deference to the trial judge since the latter has presided over the whole trial, has personally observed the evidence and witnesses, and has had the unique opportunity to evaluate the jury's reaction to the witnesses and proofs. Accordingly, the trial judge, having experienced the drama of the trial, is in the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger. Deference to the trial judge simply reflects the recognition that the trial judge has observed live testimony while the appellate court merely reviews a printed record. [*Id.* at 534.]

Although defendant does not argue generally that the verdict was excessive, the question of the excessiveness of a jury verdict is generally one for the trial court. See *id*. at 533-534 An appellate court must accord due deference to the trial court's decision and may only disturb a grant or denial of remittitur if an abuse of discretion is shown. *Id.* at 531. Courts are reluctant to overturn a jury verdict awarded for personal injuries on the ground that the amount is excessive. *McKay v Hargis*, 351 Mich 409, 419; 88 NW2d 456 (1958).

Defendant next challenges the $750,000 award to the Estate of Shirley Pellegrino "for conscious fright and shock and/or pain and suffering experienced by Shirley Pellegrino prior to the time of her death[.]" According to defendant, this award is "utterly without any basis in the evidence."

"A jury may award reasonable compensation for the pain and suffering undergone by the decedent while conscious during the intervening time between the injury and death." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180; 475 NW2d 854 (1991). "The existence of a decedent's conscious pain and suffering may be inferred from other evidence that does not explicitly establish the fact." *Id.*

Plaintiff testified at trial that he heard Shirley moan after impact. Although defendant disputes this, the jury must determine credibility when there is conflicting evidence. Furthermore, even absent evidence that Shirley moaned after impact, Dr. Werner Spitz and Dr. Cheryl Loewe both testified that Shirley did not die instantly, and this evidence permits the inference that she had conscious pain and suffering. Dr. Spitz, a forensic pathologist, testified that plaintiff died from suffocation and asphyxia because she could not move her chest due to her position in the vehicle after the accident. According to Dr. Spitz, the process of suffocation took several minutes and Shirley suffered because suffocation was "a terrorizing condition" and she would have had a "fear of impending doom, fear of dying[.]" According to Dr. Spitz, "[s]omebody who dies of inability to breathe suffers greatly." Dr. Spitz also indicated that Shirley would have suffered from physical pain, stating "physical pain is contributory but not as severe as the fear of dying." Dr. Loewe, the Wayne County Medical Examiner who performed the autopsy of Shirley Pellegrino, testified that "it probably took a matter of seconds for Ms. Pellegrino to die, perhaps minutes" and that Shirley did not die an "instantaneous death[.]"

Even excluding evidence that Shirley moaned after impact, the testimony of Drs. Spitz and Loewe that Shirley did not die instantly permits the inference that Shirley suffered pain and suffering before she died. In *Meek v Dep't of Transportation*, 240 Mich App 105; 610 NW2d 250 (2000), rev'd sub nom on other grounds in *Grimes v Dep't of Transportation*, 475 Mich 72; 715 NW2d 275 (2006), this Court affirmed an award of non-economic damages for pain and suffering when the decedent was killed, but not instantly, in a single vehicle accident in which the gasoline tanker truck the decedent was driving slid on a freeway connection ramp, which was wet due to rain, and exploded. This Court stated:

> Eyewitness testimony indicated that [the decedent] appeared to be trying to regain control of the truck before it hit the curb and overturned. The autopsy indicated that [the decedent] was alive at the point of the fire and was not killed instantaneously in the accident. Although the evidence did not indicate the point at which [the decedent] lost consciousness, it could be inferred that he was conscious certainly in the initial moments of the accident and would have been frightened or shocked during the moments that the truck was out of control and overturned. We are not convinced that the trial court's award of damages for pain and suffering is clearly erroneous. [*Meek, supra* at 122.]

Like in *Meek*, the evidence indicated that Shirley was not killed instantaneously. Therefore, it can be inferred that she endured pain and suffering in the moments after impact and before her death. In addition, it can also be inferred that Shirley was conscious during the initial moments of the accident before impact and would have been frightened in the initial moments of the accident. Therefore, the evidence was sufficient to allow the jury to reasonably conclude that Shirley suffered conscious pain and suffering.

Citing *Sweetland v Chicago & Grand Trunk Railway Co*, 117 Mich 329; 75 NW 1066 (1898), defendant argues that Shirley's moan was insufficient to establish conscious pain and suffering. In *Sweetland*, the Supreme Court held that to establish pain and suffering in consequence of an accident which caused a death, the plaintiff must establish that there was conscious suffering. *Id.* at 332. *Sweetland* involved an accident in which two trains collided and many were instantly killed. *Id.* at 331. The Supreme Court stated that the fact that the decedent may have wailed or groaned did not necessarily establish that she endured conscious pain and suffering and that whether the decedent's death was instantaneous was purely conjectural. *Id.* Unlike in *Sweetland*, in this case, the fact that Shirley did not die instantly was not conjecture. Both Dr. Spitz and Dr. Loewe testified that Shirley did not die instantly, and Dr. Loewe was the medical examiner who conducted the autopsy of Shirley. Second, even excluding testimony hat Shirley moaned after the accident, there was testimony that permits the inference that Shirley was conscious after the impact of the crash. Dr. Spitz testified that based on the weight of Shirley's brain, her brain was clearly not damaged because an injured brain swells almost immediately, and her brain was "at the very bottom of the scale for normal weights of brains." According to Dr. Spitz, a swollen brain weighs more than a brain that is not damaged or swollen, and Shirley's "brain could not have been damaged with a weight like that." He also stated that "if the brain goes into unconsciousness, total unconsciousness, in other wards [sic] where the patient is totally oblivious to what's going on, then you would probably have brain swelling." Although Dr. Spitz conceded on cross-examination that unconsciousness is not uncommon in people like Shirley who have suffered a blunt force injury and that other than plaintiff's testimony that Shirley moaned, there was "no other evidence of consciousness[,]" Dr. Spitz's testimony regarding the lack of swelling in Shirley's brain and that there probably would be brain swelling if a person was totally unconscious, at the very least, permits the inference that she suffered conscious pain and suffering.

Defendant finally argues that the trial court erred in failing to consider whether the amount of damages awarded in the present case is comparable to the damages awarded in other similar cases and that this Court should remand the matter to the trial court to undertake a comparable verdict analysis. According to defendant, such an analysis is *required* by *Palenkas*, *Gilbert*, and other Michigan cases. Defendant is simply incorrect in its assertion that a comparable verdict analysis is mandated by these cases. In *Palenkas*, our Supreme Court observed that an appellate court "may not substitute its judgment on damages for that of the jury" and that "a comparison [with other verdicts] cannot serve as an exact indicator[.]" *Palenkas*, *supra* at 538. Furthermore, our Supreme Court stated that "a trial court, in making a decision on remittitur, *should* examine a number of factors[.]" but that the trial court's "inquiry should be limited to *objective* considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* at 532 (emphasis added to the word "*should*"). Similarly, our Supreme Court stated in *Gilbert*:

> [J]udicial review of purportedly excessive jury verdicts *should* focus on the following objective factors.
>
> [1] whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; [2] whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; [and 3] whether the amount actually awarded is comparable

> to awards in similar cases within the state and in other jurisdictions. [*Gilbert*, *supra* at 764 (emphasis added), quoting *Palenkas*, *supra* at 532-533.]

Our Supreme Court's use of the word "should" in *Palenkas* and *Gilbert* indicates that the trial court *should* consider objective factors, such as those factors listed, not that the trial court *must* consider every factor listed. If the Supreme Court had used the word "must," that would indicate that the Supreme Court intended for the trial court's consideration of those factors to be mandatory rather than discretionary or permissive. See *Old Kent Bank v Kal Custom Enterprises*, 255 Mich App 524, 532-533; 660 NW2d 384 (2003). In fact, our Supreme Court even noted in *Palenkas* that "[t]he only consideration *expressly* authorized by MCR 2.611(E)(1), however, is whether the jury award is supported by the evidence." *Palenkas*, *supra* at 532 (emphasis in original). In light of the language used by our Supreme Court in the cases cited by defendant, defendant's argument that the trial court must conduct a comparable verdict analysis is unpersuasive.

Affirmed.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher